

NATURAL RESOURCES BULLETIN

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PROPOSED CHANGES TO NATIONAL INSTRUMENT 43-101 STANDARDS OF DISCLOSURE FOR MINERAL PROJECTS

National Instrument 43-101 “Standards of Disclosure for Mineral Projects” (“NI 43-101” or “Rule”) and its Companion Policy (“CP 43-101”) has been in effect since February 1, 2001. NI 43-101 replaced NP 2-A “Guide for Engineers, Geologists and Prospectors Submitting Reports on Mining Properties to Canadian Provincial Securities Administrators”. The Rule:

- establishes standards for all oral and written disclosure made by an issuer concerning mineral projects and requires that all disclosure be based on information prepared by or under the supervision of a “qualified person”;
- requires that disclosure of mineral resources and mineral reserves be made in accordance with industry standard definitions approved by the Canadian Institute of Mining, Metallurgy and Petroleum (“CIM”) unless otherwise for in the Rule; and
- requires disclosure to be supported by a written technical report prepared and certified by a qualified independent person in accordance with Rule.

On September 10, 2004 the Canadian Securities Administrators (“CSA”) published for public comment certain changes to NI 43-101 (“Proposed Amendments”). The Proposed Amendments are being made because, in the view of the CSA, the current NI 43-101 is not operating as intended. In addition, the Proposed Amendments are said to reflect changes in the mining industry, errors in the existing rule, simplify drafting, provide new exemptions, and generally make NI 43-101 more user-friendly and practical. The following discussion focuses on some of the more significant changes in the Proposed Amendments.

ROYALTY INTERESTS

The CSA is proposing changes to the definition of “mineral project” to include a royalty, net profits interest, or similar interest in a property.” As a result, issuers whose only interest in a mineral project is a royalty interest would be subject to NI 43-101 in the same manner and to the same extent as other mining issuers.

While the CSA recognizes that a royalty interest is different from other interests in mining properties, it is nevertheless of the view that NI 43-101 should apply to this type of issuer because the technical information on the mineral projects underlying a royalty interest is material information about a royalty issuer.

The CSA recognizes that it may be difficult for royalty holders to get the information they require to comply with the requirements of the Rule. However, the CSA suggests that royalty issuers could ensure that their contract negotiations with operating companies include access to the information required to complete a technical report.

FOREIGN ISSUERS

The Proposed Amendments to NI 43-101 provides for an exemption from the application of the Rule to a foreign issuer:

- that is incorporated or organized under the laws of a foreign jurisdiction;
- whose securities trade primarily on the New York Stock Exchange, Nasdaq National Market, London Stock Exchange, Australian Stock Exchange, or Johannesburg Stock Exchange and is in compliance with reporting requirements of each applicable exchange;
- that is subject to securities laws of the US, the UK, Australia, or South Africa and is in compliance with the continuous disclosure requirements of each applicable jurisdiction;
- that has less than 10 percent of its total number of equity securities, including underlying securities that are equity securities, owned directly or indirectly by residents of Canada, as calculated, on a fully diluted basis, reasonably proximate to the time the issuer discloses scientific and technical information about a mineral project on property material to the issuer; and
- that includes in any disclosure made in a Canadian jurisdiction under this exemption a statement that its disclosure does not comply with NI 43-101 and that a technical report will be filed to support the disclosure based upon an exemption provided to certain foreign issuers under that Instrument.

QUALIFIED PERSONS – INDEPENDENCE REQUIREMENT

The CSA has proposed changing the definition of independence to a “results based” definition. The Proposed Amendments state that a qualified person is not independent of the issuer if the qualified person “has, or expects any agreement, arrangement, understanding, employment or other relationship with, or any interest in, any person or company, the mineral project, the property, or any adjacent property, that a reasonable person would consider an influence on the qualified person’s judgment.” The test is whether a reasonable person would consider that the existence of such a relationship would influence the qualified person’s judgment.

The CSA has set out a number of examples in the Proposed Amendments to CP 43-101 which would not meet the independence requirement. These include where the qualified person:

- is an employee, insider, or director of the issuer or a related party of the issuer or a partner of any of these individuals;
- holds or expects to hold securities of the issuer, or a related party of the issuer, or another issuer with an interest in the property that is the subject of a technical report, or a contiguous property to the property which is the subject of the technical report;
- has received the majority of their income in the preceding three years from the issuer or a related party of the issuer; or
- has received cash or securities of the issuer for past work done for the issuer on the understanding that the qualified person has a non-monetary debt to repay the issuer for any future work for the issuer.

Discretionary relief from the independence requirement may be granted by the CSA where an issuer demonstrates that independence is not necessary in the particular circumstances.

PERSONAL INSPECTION REQUIREMENT

The CSA have proposed amendments to NI 43-101 to modify the requirement that the qualified person preparing the technical report inspect the property that is the subject of the report. The Proposed Amendments provide an exemption from the personal inspection requirement for “grassroots exploration properties” where the qualified person because of extreme seasonal weather conditions can’t visit the property or obtain any beneficial information from a site visit. “Grassroots exploration property” is defined in the Proposed Amendments as a property with no drilling or trenching activity and where none is proposed for the property.

Examples given by the CSA of extreme weather conditions include inaccessibility due to seasonal flooding or where the property is completely covered in snow for an extended period of time. Other than in these circumstances where it is not possible to inspect the property, the issuer must obtain relief from the CSA where they wish to avoid a site visit. Disclosure of the reasons for not visiting the site must be included in the technical report.

TECHNICAL REPORTS – ACCREDITED INVESTORS

NI 43-101 contains a requirement that an issuer must file a technical report in connection with certain written disclosure about mineral projects on mineral properties. One type of disclosure is an offering memorandum. A current technical report must be filed to support information in an offering memorandum describing a mineral project on a material property distributed in Canada. The CSA has proposed amendments to NI 43-101, which would remove the requirement that an offering memorandum trigger a technical report where the issuer is using an offering memorandum with the accredited investor exemption under local securities laws.

SAMREC CODE

The CSA has proposed adding the South African Code for Reporting of Mineral Resources and Mineral Reserves (“SAMREC Code”) and replaced USGS Circular 831 with SEC Industry Guide 7 as acceptable foreign codes for reporting mineral resources and mineral reserves.

As a result, issuers incorporated outside of Canada would be able to file a technical report that uses the mineral resource and mineral reserve categories of the JORC Code, the SEC Industry Guide 7, the IMMM System or the SAMREC Code if a reconciliation to the mineral resource and mineral reserve categories set out in NI 43-101 is disclosed in the technical report. Issuers incorporated in Canada but with properties outside of Canada would also be able to report under the JORC Code, the SEC Industry Guide 7, the IMMM System or the SASMREC Code if appropriate reconciliation and disclosure is made.

In the instance where an issuer announces the acquisition or proposed acquisition of property that are not in accordance to the CIM standards or the alternative codes set out above, the issuer may apply to the CSA for an exemption to disclose the foreign estimates as is or if applicable for an extension of time for filing a technical report (for example, the Russian and Chinese codes).

DISCLAIMERS IN TECHNICAL REPORT

The CSA has expressed a concern with the use of blanket disclaimers by qualified person in connection with the technical reports where the qualified person has relied on other experts who are not qualified persons for legal, environmental, political or other issues relevant to the report that are not within the qualified person expertise. In the view of the CSA, these disclaimers may be misleading and are also unnecessary because securities legislation provides qualified person with certain protections.

Under the Proposed Amendments blanket disclaimers will not be available where the disclaimer purports to disclaim responsibility for all or a portion of the report that the qualified person prepared or creates any limitations on the use of the publication of the report which would interfere with the issuer’s continuous disclosure obligations.

SUMMARY

The Proposed Amendments deal with many of the practical problems that issuers have had in applying NI 43-101. However, in some instances the Proposed Amendments will result in extensions of the ambit of the Rule where arguably such coverage is not necessary, for example to royalty holders. It remains to be seen what further changes that the CSA will make to NI 43-101 and the Proposed Amendments as a result of the public comment process.

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted.

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